

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

RECEIVED

AUG 15 2003

Department of Water Resources
Eastern Region

IN THE MATTER OF DETERMINING A FUTILE)
CALL FOR THE DELIVERY OF SURFACE)
WATER IN WATER DISTRICT NO. 34,)
BIG LOST RIVER)

ORDER

The Director of the Department of Water Resources ("Department") being charged with the duty of protecting vested water rights and enforcing certain statutes of the State of Idaho together with the rules of the Department, has consulted with the watermaster for Water District No. 34 ("Watermaster") regarding the determination of a futile call and delivery of surface water on the Big Lost River.

Based on the Department's investigation and understanding of the law, the Director finds as follows:

FINDINGS

1. Rule 20.04 (IDAPA 37.03.12.20.04) of the Rules Governing Water Distribution in Water District No. 34 ("Water Distribution Rules") provides:

Rule 37.03.12.020.04. Futile Call for the Delivery of Surface Water

When curtailment of junior upstream surface water rights will not make water available for delivery and use to senior downstream surface water rights, without unreasonable waste as determined by the Director, the watermaster will not curtail the junior water rights in a futile effort to deliver water to the senior rights. The Director may consult the Water District 34 advisory board, the Big Lost River Irrigation District and other impacted water users when determining whether attempting to deliver senior downstream surface water rights would be futile.

2. The Watermaster has contacted the Director and provided measurements of the flow and diversions in the various reaches of the Big Lost River for those reaches defined in the Water Distribution Rules. The following data pertinent to this order were provided by the watermaster:

- a. For the Leslie gaging station and downstream diversions, the Beck Diversion is the only diversion between the Leslie Bridge and Moore/Eastside Diversions that was receiving water between July 31, 2003, and August 5, 2003.

Date	Discharge (cfs)			
	Big Lost River at Leslie Bridge	Beck Diversion	Moore Diversion	Eastside Diversion
7/31/2003	160	12	50	18
8/1/2003	134	12	15	Gates closed
8/2/2003	80	12	0	Gates closed
8/3/2003	60	9	0	Gates closed
8/4/2003	Below bottom of staff gage – estimated visually as 20-40 cfs	9	0	Gates closed
8/5/2003	Below bottom of staff gage – estimated visually as 20-40 cfs	9	0	Gates closed

- b. Mackay Reservoir was essentially empty, with a reported volume of 363 acre-feet on August 4, 2003. The decrease in reservoir contents on August 3 and August 4, 2003, was equivalent to 20 cfs and 21 cfs, respectively.
- c. The Watermaster reported on August 1, 2003, that he had cut delivery of water rights on the Big Lost River to 30 percent of the May 20, 1884, water rights. The Watermaster attempted to maintain this priority cut between August 2 and August 6, 2003.
- d. Water rights diverted at the Moore Diversion having priority dates of August 10, 1883, or earlier total 13.4 cfs. There are approximately 39 cfs of water rights between Mackay Dam and the Beck Diversion with priority dates ranging from April 22, 1884, through May 20, 1884. All of the rights currently being delivered between Mackay Dam and the Beck Diversion would have to be cut to attempt delivery of the smaller quantity of water to the more senior rights at the Moore Diversion. Based on the experience of the prior watermaster, curtailing all of the rights between Mackay Dam and the Beck Diversion in an effort to deliver the remaining water to the Moore Diversion via the river channel would not result in additional usable water in the Moore Canal because of seepage losses in both the river channel and the Moore Canal. On August 4, 2003, the Watermaster submitted a letter requesting that the Department make a determination as to whether a delivery call by the senior rights diverted at the Moore Diversion against upstream junior rights diverted between Mackay Dam and the Moore Diversion constituted a futile call.
- e. On August 7, 2003, the Department instructed the Watermaster to curtail all diversions of water rights later in time than August 10, 1883, in the Mackay and Leslie reaches of the Big Lost River, including the Beck diversion (located just below the Leslie gage). The Department further instructed the Watermaster to

attempt to deliver the senior 1883 priority water rights at the Moore Diversion. The Department further ordered the Watermaster to report on August 11, 2003, the amount of water reaching the Moore Diversion.

3. On August 11, 2003, the watermaster reported that no water had reached the Moore Diversion. The watermaster reported that about 100 cfs of water was flowing past the Leslie Bridge on August 11, 2003, but that none of this water was reaching the Moore Diversion. The Watermaster reported that there were no diversions of water from the river between the Leslie Bridge and the Moore Diversion between 10:30 am on August 8, 2003, and 10:30 am on August 11, 2003. By regulating upstream diversions, all of the water between Leslie and Moore was lost through natural channel loss and evaporation.

4. Based upon the information supplied by the Watermaster, the call for the delivery of surface water in the Big Lost River by senior right holders located from Leslie downstream to and including the Moore Diversion would be futile.

ORDER

Based on the foregoing findings, the Director hereby orders as follows:

1. Curtailment of junior priority surface water rights upstream of the Moore Diversion in favor of senior priority rights at the Moore Diversion constitutes a futile call by the senior water right holders at the Moore Diversion for the remainder of the 2003 irrigation season, except as provided in no. 3 below.
2. The Watermaster is hereby instructed to distribute surface flows of the Big Lost River in the reach from Mackay Dam to the Beck Diversion as a separate source for the remainder of the 2003 irrigation season, except as provided in no. 3 below.
3. With the approval of the Director, the Watermaster may discontinue the futile call determination anytime during the 2003 irrigation season if it is subsequently determined that delivery is no longer futile.

Dated this 11th day of August, 2003.



Karl J. Dreher
Director

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that on this 12th day of August, 2003, the attached ORDER was served upon the following individuals by placing a copy of the same in the United States Mail, postage prepaid, and properly addressed as follows:

Bob Duke, Watermaster
Water District 34
P.O. Box 53
Mackay, ID 83251

Bob Shaffer, General Manager
Big Lost River Irrigation District
P.O. Box 205
Mackay, ID 83251

Ann S. Andersen
Larman D. Andersen
Rt 1 Box 52
Moore, ID 83255

Mary Ann Burt
Fred N Burt
P.O. Box 628
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Phyllis J. Jones
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Penny R. Hawkins
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Vaughn L. Jensen
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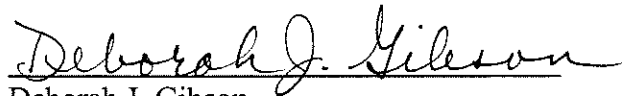
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Deborah J. Gibson
Administrative Assistant
Water Allocation Bureau

**EXPLANATORY INFORMATION
TO ACCOMPANY A
FINAL ORDER**

(To be used in connection with actions when a hearing was not held)

(Required by Rule of Procedure 740.02)

The accompanying order is a "Final Order" issued by the department pursuant to section 67-5246, Idaho Code.

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a final order within fourteen (14) days of the service date of this order as shown on the certificate of service. **Note: The petition must be received by the Department within this fourteen (14) day period.** The department will act on a petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See section 67-5246(4), Idaho Code.

REQUEST FOR HEARING

Unless the right to a hearing before the director or the water resource board is otherwise provided by statute, any person who is aggrieved by the action of the director, and who has not previously been afforded an opportunity for a hearing on the matter shall be entitled to a hearing before the director to contest the action. The person shall file with the director, within fifteen (15) days after receipt of written notice of the action issued by the director, or receipt of actual notice, a written petition stating the grounds for contesting the action by the director and requesting a hearing. See section 42-1701A(3), Idaho Code. **Note: The request must be received by the Department within this fifteen (15) day period.**

APPEAL OF FINAL ORDER TO DISTRICT COURT

Pursuant to sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by a final order or orders previously issued in a matter before the department may appeal the final order and all previously issued orders in the matter to district court by filing a petition in the district court of the county in which:

- i. A hearing was held,
- ii. The final agency action was taken,
- iii. The party seeking review of the order resides, or
- iv. The real property or personal property that was the subject of the agency action is located.

The appeal must be filed within twenty-eight (28) days of: a) the service date of the final order, b) an order denying petition for reconsideration, or c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration, whichever is later. See section 67-5273, Idaho Code. The filing of an appeal to district court does not in itself stay the effectiveness or enforcement of the order under appeal.